

No. 48497-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RUSSELL BURKE and JULIE BURKE, and their marital community,

Plaintiffs/Appellants,

v.

CITY OF MONTESANO; KEN ESTES and “JANE DOE” ESTES;
KRISTY POWELL and “JOHN DOE” POWELL; and ROCKY
HOWARD “JANE DOE” HOWARD,

Defendants/Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE ERIK PRICE
THURSTON COUNTY SUPERIOR COURT CASE NO. 14-2-01089-1

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

A. The analytical framework applied has no substantive impact on this appeal, particularly where the Respondents' entire position amounts to a challenge to causation.

Whether this Court applies the abbreviated framework from *Thompson* or the more extensive four-part Perritt analysis from *Gardner*, the outcome is the same – summary judgment is improper. There is no substantive difference between these approaches. *See Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 278, 358 P.3d 1139 (2015) (stating that “[i]n adopting this four-part Perritt analysis, we stated that we did not intend to substantively change the wrongful discharge tort.”).

Under the *Thompson* framework, “the plaintiff must plead and prove that his or her termination was motivated by reasons that contravene an important mandate of public policy.” *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 258, 359 P.3d 746 (2015). If the plaintiff satisfies this requirement, “the burden shifts to the employer to plead and prove that the employee's termination was motivated by other, legitimate, reasons.” *Id.* This framework is typically applied when a case falls within one of the four recognized scenarios, including “where employees are fired for exercising a legal right or privilege” *Id.* at 259. In contrast, the four Perritt elements are typically utilized when the case does not fit neatly within one of the recognized scenarios. *Id.* The four elements include (1)

clarity, (2) jeopardy, (3) causation, and (4) overriding justification. *See* Brief of Appellants at 17.

Here, the Appellants argued the more-extensive Perritt factors in their opening brief because the Respondents challenged the existence of the clarity element in their motion for summary judgment, apparently refusing to acknowledge that terminating a public employee for his protected first amendment activity would support a termination in violation of policy claim. Brief of Respondents at 33-36. The position advocated by the Respondents on appeal appears to be that the *Thompson* framework is the correct approach, which tacitly acknowledges the existence of a clear public policy. *Id.* at 34. However, as addressed *infra*, the framework applied by this Court makes little difference because the Respondents' argument, at its essence, is that the Appellants failed to present sufficient evidence to support causation.

B. The only issue on appeal is whether the Appellants presented sufficient evidence to create a genuine issue of material fact regarding causation; the Respondents' arguments regarding clarity and jeopardy are inapplicable and unpersuasive.

The primary thrust of the Respondents' position is that the length of time between the day Mayor Estes confronted Burke and the day that he terminated him nullifies any inference that Burke's termination was motivated by retaliation. *See* Brief of Respondents *generally*. At its

essence, this is a causation argument. *See Id.* The fatal flaws in this position are addressed *infra*.

Beyond this argument, they also attempt to offer arguments regarding the clarity element, the jeopardy element, and the appropriate analytical framework. *See Id.* at 30-43. However, these arguments are primarily a recasting of their causation argument and are unpersuasive to this appeal.

(1) The Respondents' clarity argument is a causation argument.

There is no reasonable dispute that the Appellants have satisfied the first element of their claim: clarity. The Appellants' termination in violation of public policy claim is rooted in a clear public policy – Burke's constitutional and statutory right to freedom of expression, association, belief, and assembly. Brief of Appellant at 18-23.

The clarity element of a termination in violation of public policy claim requires the plaintiff to "prove the existence of a clear public policy." *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). When Washington courts describe this claim as being narrow, they are referring to the clarity element. *See e.g. Id.* at 936-37 (quoting *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 231, 685 P.2d 1081 (1984)). Specifically, they recognize that "*courts should proceed cautiously if called upon to declare public policy absent some prior*

legislative or judicial expression on the subject.” Id. The existence of a clear public policy is a question of law, not dependent upon the facts of a particular case. *See Id.*

Here, the section of the Respondents’ brief dedicated to the clarity element is a causation argument. *See* Brief of Respondents at 36-39.

Understandably, they do not contest the existence of the public policy at issue, Burke’s right to freedom of expression, association, belief, and assembly. *See Id.* Whether Burke’s termination was caused by his exercise of these rights is a separate issue, addressed *infra*. In addition, the Respondents’ arguments based upon the *Heffernan* case are related to jeopardy and causation, rather than clarity, and are also addressed *infra*.

(2) The Respondents’ jeopardy argument is presented for the first time on appeal in violation of RAP 2.5(a) and 9.12, and is unsupported.

The jeopardy element is satisfied because Burke contends that he was terminated because he was exercising his constitutional and statutory rights. *See* Brief of Appellant at 23. “[A] plaintiff may prove ‘jeopardy’ either because his or her conduct *directly relates* to the public policy *or* because it was *necessary* for the effective enforcement of that policy.” *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 310, 358 P.3d 1153 (2015). This disjunctive language establishes two distinct options for satisfying this element. *Rose*, 184 Wn.2d at 284. Under the first, conduct

directly relates “where there is a direct relationship between the employee's conduct and the public policy, the employer's discharge of the employee for engaging in that conduct inherently implicates the public policy.” *Id.* Here, the Respondents’ opposition arguably presents two issues related to this element, both of which are raised for the first time on appeal in violation of RAP 2.5(a) and 9.12.

First, the Respondents reference but do not argue exceptions to the constitutional prohibitions on patronage practices recited in *Heffernan v. City of Paterson*. Brief of Respondents at 38-39¹. These exceptions include the need for governmental efficiency², neutral policies, and jobs in which political affiliation is required. *See Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1417 (2016). The Respondents’ fail to offer any analysis regarding how any of these exceptions might apply to this case, and they failed to raise them in their summary judgment motion. *See* CP at 264-89. Specifically, they do not claim the existence of a neutral and limited policy prohibiting employees from partisan activity. *Compare* Brief of Appellants at 39 *and U. S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 560-61, 93 S. Ct. 2880, 37 L.

¹ They are referenced in the clarity section of their brief, but relate more directly to jeopardy because they impact whether Burke’s conduct was constitutionally protected, not whether the public policies exist.

² The Respondents’ brief says “efficacy,” which appears to be a typographical error. *Compare* Brief of Respondents at 39 *and Heffernan*, 136 S. Ct.at 1417.

Ed. 2d 796 (1973). Nor do they claim that governmental interests, such as efficiency, outweigh Burke's interest in free political activity. *Compare* Brief of Appellants at 39 and *Waters v. Churchill*, 511 U.S. 661, 671-75, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994). And, finally, they do not argue that Burke's position required political affiliation. *See* Brief of Appellants at 39. Given Mayor Estes' claimed lack of knowledge regarding Burke's position and lack of contact with Burke, any such argument would be unpersuasive. *Compare* CP at 435-36 (33:24-34:16) and *Branti v. Finkel*, 445 U.S. 507, 518, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980). Accordingly, there is no reasonable dispute that Burke's conduct directly related to the public policy at issue.

Second, the Respondents argue that there is no jeopardy because Burke was not in fact deterred from further political activity. *See* Brief of Respondents at 41. This argument is raised for the first time on appeal, in violation of RAP 2.5(a) and 9.12. The use of the word "jeopardizes" in the Respondents' motion for summary judgment is insufficient to avoid this conclusion. *See* CP at 280. In addition, this argument is based on a misapplication of the jeopardy standard.³ The Appellants are not required to show that Burke was in fact deterred; instead, they must show how the

³ As an initial matter, the Respondents' argument is based upon language from the dissent in *Rose*. *See Id.* at 41 (quoting Justice Fairhurst's dissent).

discharge will “discourage **others** from engaging in desirable conduct.” *Becker*, 184 Wn.2d at 262 (emphasis added). As reflected in this language, it is the potential impact on others, not Burke, that matters. The United States Supreme Court noted in *Heffernan* that “[t]he discharge of one tells the others that they engage in protected activity at their peril.” 136 S. Ct. at 1419 (2016). The Appellants are not required to prove that anyone was in fact deterred from political activity. *See e.g. Id.* (stating that “we do not require plaintiffs in political affiliation cases to prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance.”). Instead, the question is whether the termination of Burke in retaliation for his protected political activity would deter others from similar activity. And, there is no reasonable dispute that the answer to this question is yes.

Moreover, the Respondents’ reliance⁴ upon *Wrobel v. County of Erie* is misplaced. *See* Brief of Respondent at 36-37. In *Wrobel*, an employee brought a 42 U.S.C. § 1983 claim based on the allegation that the newly elected Executive for the County, who was a republican, targeted the employee based on his friendship with the prior Executive, who was a democrat. 692 F.3d 22, 25-27 (2d Cir. 2012). While a supervisor made comments referring to the existing employees as the “old

⁴ They reference *Wrobel* in the clarity section of their case; however, their argument relates more to the jeopardy element of the claim. *See* Brief of Respondent at 36-37.

regime” and comments about bringing in a new regime, the court concluded that the transfer was not based on political association. *Id.* at 28-29. Specifically, the court stated that “there is no evidence or available inference that this distinction is political in the sense that it relates to any political, social, or other community concern.” *Id.* at 28. In *Wrobel*, the public policy reflected in the First Amendment was not jeopardized because the conduct was not protected. *See Id.* In contrast, Burke’s conduct directly relates to the public policy at issue because his conduct was protected. Therefore, jeopardy is present.

C. Genuine issues of material fact regarding causation preclude summary judgment where the evidence supports an inference of retaliation.

The Respondents’ primary argument, that Burke’s termination was not caused by retaliation, is an invitation to misapply the summary judgment standard, calling for the wholesale disregard of critical factual issues and for the facts to be weighed in the Respondents’ favor.

(1) Burke’s speculation about the motivation of Howard and Powell is not relevant to or dispositive of the causation element.

The Respondents’ attempt to draw a parallel between *Grimwood v. University of Puget Sound* and this case is unpersuasive; instead, the standards set forth in *Grimwood* undermine one of the Respondents’ primary arguments – Burke’s speculation about the motivation of Rocky

Howard and Kristy Powell and the legal conclusion that he lacked evidence that the paint investigation was retaliatory. *See* Brief of Respondents at 11, 15-17. In *Grimwood*, the Court affirmed summary judgment in favor of an employer, dismissing the employee's age discrimination claim based on his termination.⁵ *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988). Applying the *McDonnell Douglas* framework, the Court concluded that the employee established a prima facie case and the employer met its burden of production, but the employee failed to create a genuine issue of material fact regarding whether the employer's proffered justification was pretext. *Id.* at 364. The Court recognized that the employee's affidavit presented "only his conclusions and opinions as to the facts set forth in the defendant's affidavit." *Id.* at 360. The employee's affidavit failed to establish "*facts* to which the affiant could testify from personal knowledge and which would be *admissible in evidence*." *Id.* at 359.

Here, Burke's speculation regarding the motive of Howard and Powell would not be admissible because it was not based on his personal knowledge. In addition, Burke's legal conclusion that he lacked evidence that the paint investigation was retaliatory is also inadmissible. And unlike the employee in *Grimwood*, Burke presented admissible evidence of

⁵ The employee also asserted claims for breach of contract and wrongful termination, which were also dismissed on summary judgment. 110 Wn.2d at 365-67.

pretext, discussed *infra*, creating a genuine issue of material fact regarding the reason for his termination.

- (2) In contrast to *Heffernan*, the facts in this case are in dispute, including the reason for Burke's termination.

The Respondents couch their causation argument using the phrase “undisputed facts.” *See e.g.* Brief of Respondents at 39. They cite the *Heffernan* case as the source of this phrase, arguing that “the focus should be on whether Burke has made a prima facie showing under the undisputed **facts**.” *Id.* (emphasis added). In *Heffernan*, there was no dispute regarding the **reason** for the employee's discharge, based upon a simplified version of the facts. 136 S. Ct. at 1416. Unlike *Heffernan* and contrary to the arguments of the Respondents, the facts in this case and the reason for Burke's termination are in dispute. Under the disputed facts, considered in the light most favorable to the Appellants, summary judgment is improper.

- (3) There is a genuine issue of material fact regarding the reason for Burke's termination based on Powell's email stating that Mayor Estes wanted Burke terminated before Burke was directed to attend an interview.

Summary judgment is improper because there is a genuine issue of material fact regarding the reason for Burke's termination based upon Kristy Powell's March 14, 2013 email. CP at 489. In summary, Powell sent an email on March 14, 2013, stating that our “objective is that

[Burke] will no longer work here.” CP at 481 (58:3-4), 489. She admitted that the term “our” included Mayor Estes, who ultimately terminated Burke in June of 2013. *Id.* She sent this email eight days before Burke was ever asked to submit to an interview. *See* CP 43-45. And, the email was sent at a time for which Mayor Estes conceded that he did not have a reason to terminate Burke. *See* CP at 453 (243:1-4), 471 (101:11-25). Therefore, Mayor Estes decided to terminate Burke prior to the internal investigation, apparently without any legitimate justification. Tellingly, the Respondents have not attempted to offer a legitimate explanation for the Mayor’s decision to terminate Burke at this time. *See* CP *generally*.

Instead, they largely ignore this critical fact. The only place they address it is in their statement of facts, where they rely upon Powell’s contradictory testimony. *See* Respondents’ Brief at 22. They claim that Powell could not recall why the email was sent, what the objective of the email was other than to move the investigation forward, and that Mayor Estes did not want to terminate Burke. *See Id.* In essence, they ask this Court to construe the facts in their favor and to ignore the clear content of the email.

The email unambiguously states that they wanted Burke’s employment with the City to end. CP at 489. During her deposition, Powell could not offer any contrary interpretation of the language she used

in the email. CP at 481(60:3-12). Her attempt to contradict the clear language of the email, by claiming that it concerned moving the investigation along, is unpersuasive. See Respondents' Brief at 22. She could not remember the status of the investigation, whether Burke had been asked to submit to an interview⁶, or why it could not go forward at that time. CP at 481 (59:4-6, 61:3-12). Her testimony cannot be weighed more heavily than the content of her email on summary judgment.

The final factual argument the Respondents make is that "[i]t is undisputed that Mayor Estes did not write the email and that it did not arise until after the criminal investigation had already commenced"⁷ Respondents' Brief at 22. These arguments are immaterial. First, whether Mayor Estes wrote the email does not undermine its import. Second, the relationship between the commencement of the criminal investigation and this email is irrelevant based upon Mayor Estes's testimony that he had "no proof" that Burke stole paint until after Burke's termination. CP at 453 (243:1-4). Accordingly, there is a genuine issue of material fact regarding why Burke was terminated.

(4) The facts support an inference that Burke's termination was motivated by retaliation for his protected political activity.

⁶ Burke was not asked to submit to an interview until March 22, 2013. CP at 43-45.

⁷ They go on to make a proximity-in-time argument, which is addressed *infra*. CP at 22.

The facts and reasonable inferences therefrom, when considered in the light most favorable to the Appellants, support an inference that Burke's termination was substantially motivated by retaliation for his protected political activity. The inference is supported by a number of facts, including the Mayor's direct confrontation of Burke for his protected political activity in December of 2011, multiple instances of adverse employment action within close proximate time to the confrontation beginning in January or February of 2012, and the Mayor's decision to terminate Burke in March of 2013. *See* CP at 478 (31:21-32:4), 489, 566-67, 782, 783, 784, 801.

The primary opposition offered by the Respondents is the argument that a lack of proximity in time between the confrontation and Burke's ultimate termination precludes an inference of retaliation. However, their argument is built upon a misconstruction of the law and the facts of this case. First, they prop up proximity in time as if it is the only means of establishing an inference of retaliation. *See* Brief of Respondents at 31-33. It is not. As reflected in the Court's language in *Wilmot*, proximity in time may be "a typical beginning point . . .," it is not the only one. 118 Wn.2d at 69.

"To show that retaliation was a substantial or motivating factor behind the adverse employment action, a plaintiff can (1) introduce

evidence that the speech and adverse employment action were proximate in time, such that a jury could infer that the action took place in retaliation for the speech; (2) introduce evidence that the employer expressed opposition to the speech; or (3) introduce evidence that the proffered explanations for the adverse action were false and pretextual.” *Anthoine v. North Central Counties Consortium*, 605 F.3d 740, 750 (9th Cir. 2010). Evidence of any one of these three options is sufficient to defeat a motion for summary judgment. *See Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 744 (9th Cir. 2001) (stating that “the plaintiff, in addition to producing evidence that his employer knew of his speech, produced evidence of at least one of the following three types.”). Here, all three types of circumstantial evidence support an inference of retaliation, precluding summary judgment.

a. The close proximity in time between Mayor Estes’s confrontation of Burke and adverse employment action suffered by Burke supports an inference of retaliation.

The Respondents argue that the duration between Mayor Estes’s confrontation of Burke in December of 2011 and Burke’s termination in June 2013 is not only too long to support an inference but also undermines any claim of retaliation. *See e.g.* Brief of Respondent at 32. However, their argument requires this Court to ignore or resolve material factual disputes regarding adverse employment action suffered by Burke, use the

incorrect timeframe, and apply a per se timeframe requirement without any applicable authority.

First, adopting the Respondents' position would require this Court to ignore critical facts, including adverse employment action suffered by Burke, and to resolve factual disputes in their favor. The 18-month timeframe fails to account for Burke's demotion in January or February of 2012. *See* CP at 478 (31:21-32:4), 783, 784, 801. The evidence, including Mayor Estes' contradictory testimony, casts doubt on his justification for the demotion. *Compare* at 430-36 (30-36) *and* 783. In addition to the contradiction in the Mayor's use of the term leadership, the supposed impetus for the change was complaints that were never investigated. CP at 434 (29:10-30:9), 436 (34:23-35:3). And even if the justification was not so questionable, there is no dispute that Burke was effectively demoted. CP at 478 (31:21-32:4), 783. His role within the public works was dramatically reduced, such that Powell took over the selection of projects and scheduling the crew. CP at 783, 784, 801. This is adverse employment action, within close proximate time to the confrontation, supporting an inference of retaliation. *See* CP at 782.

The Respondents also ask this Court to ignore the failure to promote Burke in May of 2012, based on a misconstruction of the evidence. *See* Respondents' Brief at 20. Specifically, they rely upon

Burke's speculative deposition testimony that "Burke does not allege Rocky Howard's eventual acceptance of the Public Works Director position in May of 2012 was retaliatory." *Id.* The Respondents' attempted sleight of hand is exposed through a consideration of the perspective. It was, of course, not Howard's acceptance but the Mayor's failure to promote Burke that was retaliatory, particularly considering the Mayor's conflicting testimony regarding why Burke was not promoted. *Compare* CP at 463 *and* 444 (96:12-14), 445-46 (101:23-102:7, 105:6-13). The Respondents' fail to offer any response or attempt to reconcile the conflict.

Second, the 18 months between the Mayor's confrontation of Burke in December of 2011 and his termination of Burke in June of 2013 is not the appropriate timeframe. This approach ignores the adverse employment actions suffered by Burke shortly after Mayor Estes took office and the fact that Mayor Estes had decided to terminate Burke at least three months before June of 2013. *See* CP at 478 (31:21-32:4), 489, 566-67, 782, 783, 784, 801. After Mayor Estes took office, Burke was demoted within a month or two, was not promoted within five months, and was subjected to other acts of animus thereafter. *See Id.* Then, Mayor Estes decided to terminate him at least as early as March 14, 2013. *See Id.*

Third, the authority cited by the Respondents does not support the application of a per se timeframe or the contention that the timeframe at

issue is too remote to support an inference of retaliation. See Respondents' Brief at 32. The majority of cases cited by the Respondents in support of their proximity in time argument are inapplicable. *See Bravo v. Dolsen*, 125 Wn.2d 745, 888 P.2d 147 (1995) (reversing dismissal under CR 12(b)(6) on the legal issue of whether statutory protections for concerted activity applied to non-union employees); *See Also Blinka v. Washington State Bar Ass'n*, 109 Wn. App. 575, 36 P.3d 1094 (2001) (concluding that the jury's finding on retaliatory discharge and wrongful termination claims was supported by substantial evidence); *See Also Hayes v. Trulock*, 51 Wn. App. 795, 755 P.2d 830 (1988) (analyzing the damages recoverable through a successful wrongful termination claim).

And while *White v. State* addressed the causation issue on summary judgment, it is materially distinct from this case. *See* 131 Wn.2d 1, 929 P.2d 396 (1997). In *White v. State*, the Court affirmed the summary judgment dismissal of an employee's 42 U.S.C. § 1983 claim because the employee failed to present evidence of a causal connection between the employee's protected speech and a lateral transfer, which she claimed was retaliatory. *Id.* The employee's protected speech occurred on May 4, 1988 and she was notified of her transfer in August of 1988; however, her employer presented evidence that it had been working on the reorganization plan as early as December of 1987 and the employee was

unable to present any evidence of pretext, other than speculation. *Id.* at 5-7, 16-18. Fundamentally, *White v. State* affirms the importance of evidence of pretext⁸, and offers no guidance regarding proximity in time.

Finally, the Respondents reference but do not offer any analysis regarding two extra-jurisdictional cases: *Dennison v. Murray State Univ.* and *Strouss v. Michigan Dep't of Corr.* See Respondents' Brief at 32. While these cases address the proximity in time issue, they support the rejection of a much larger timeframe than at issue in this case. In *Dennison*, the court found that a gap of nearly three years "was too lengthy to give rise to an inference of retaliatory motive." 465 F. Supp. 2d 733, 748 (W.D. Ky. 2006). Similarly, in *Strouss*, the court held there was insufficient evidence to support a First Amendment retaliatory transfer claim where there was a three year delay between the speech and transfer. 250 F.3d 336, 346 (6th Cir. 2001). The authority relied upon by the Respondents does not support their contention.

Contrary to the Respondents' arguments, the proximity in time analysis is not a "mechanical inquiry." *Anthoine*, 605 F.3d at 751 (9th Cir. 2010) (discussing *Coszalter v. City of Salem*, 320 F.3d 968 (9th Cir. 2003)). "Whether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in the light of the

⁸ The Appellants presented compelling evidence of pretext, as discussed *infra*.

timing and the surrounding circumstances.” *Coszalter*, 320 F.3d at 978⁹.

Proximity in time is only one consideration – “the length of time, considered without regard to its factual setting, is not enough by itself to justify a grant of summary judgment.” *Id.*

“[T]hree to eight months is easily within a time range that can support an inference of retaliation.” *Id.* at 977. And, there is precedent supporting an inference of retaliation based upon a five-year delay between the protected activity and the adverse employment action, where the evidence shows a pattern of antagonism. *See Adetuyi v. City & Cty. of San Francisco*, 63 F. Supp. 3d 1073, 1089-91 (N.D. Cal. 2014).

Here, the proximity in time between Mayor Estes’s confrontation of Burke and the subsequent adverse employment action suffered by Burke weighs in favor of an inference of retaliation. Burke was demoted within two to three months of the Mayor’s confrontation, and within a month or two of Mayor taking office. CP at 478 (31:21-32:4), 783, 784, 801. He was also passed over for a promotion, for a reason contradicted by Mayor Estes in his deposition, within five months of the Mayor taking office. *Compare* CP 443 (91:22-92:5), 463 *and* 783. Thereafter, Burke was subjected to a pattern of animosity. *See* Brief of Appellants at 9-13. Then, Mayor Estes decided to terminate Burke at least as early as March 14,

⁹ The rationale against applying a mechanical inquiry is set forth in the *Coszalter*. *See* 320 F.3d 968, 978 (9th Cir. 2003)

2013. *See* CP at 489. These facts support an inference of retaliation based upon proximity in time.

b. Mayor Estes's expressed opposition to Burke's speech also supports an inference of retaliation.

An inference of retaliation is also warranted based on Mayor Estes's expressed opposition to Burke's protected activity. *See* Brief of Appellants at 37. Mayor Estes grilled Burke about his campaign party, telling him that he shouldn't have had the party. CP at 331-32, 566-67. The Respondents do not offer any contrary authority or argument. *See* Brief of Respondents *generally*. Accordingly, Mayor Estes's expressed opposition to Burke's protected activity supports an inference of retaliation.

c. The Appellants presented evidence that the proffered explanations for the adverse employment action suffered by Burke, including his termination, were pretext.

An inference of retaliation is also supported by evidence of pretext. The Appellants presented evidence that Burke's demotion, the City's failure to promote Burke, and Burke's termination were pretext. Brief of Appellants at 6-9, 28-29. Beyond asking this Court to disregard the March 14, 2013 email reflecting Mayor Estes's decision to terminate Burke without justification, the Respondents' pretext argument is that Powell was not qualified to give expert testimony regarding the legal significance

of Mr. Snyder's email. Brief of Respondents at 22. This argument misses the issue.

Mayor Estes testified that the final action giving rise to Burke's termination was his failure to attend a *Loudermill* hearing on June 17, 2013; however, no *Loudermill* hearing was scheduled that day. *See* CP at 122, 127-28, 397:12-15¹⁰. In addition, Powell testified at the unemployment hearing that Burke's failure to attend a *Loudermill* hearing formed a portion of the basis for his termination. CP at 564. Contrary to the Respondents' arguments, her testimony was not based upon an interpretation of Mr. Snyder's email it was based on a document she prepared. *Compare* CP at 564 (564:17-23) (referencing page 37) *and* 915:11-17 (noting that Powell wrote the statement on page 37). Both Mayor Estes and Powell's testimony regarding terminating Burke for failing to attend a *Loudermill* is contradicted by Mr. Snyder's email, stating that he was not compelled to attend a *Loudermill* hearing. CP at 127. The evidence of pretext precludes summary judgment.

- (5) The Respondents' arguments regarding the same decision maker inference, the attendance of other employees at the campaign party, Burke abandoning grievances and arbitration, and the probable cause finding do not undermine the inference of retaliation.

¹⁰ The Respondents incorrectly describe this portion of the record as being testimony from the unemployment hearing; it is from Mayor Estes's deposition. *See* CP at 397.

The Respondents make a variety of arguments against the inference of retaliation, including: (a) the same actor inference, (b) that other employees attended the campaign party, (3) that Burke abandoned his grievances and arbitration, and (4) that there was probable cause for second degree theft. *See* Brief of Respondents at 47-49. None of these arguments apply or undermine the inference of retaliation in this case.

- a. The same actor inference does not apply because Burke was not hired by any of the individual Respondents and Powell was not the person who terminated Burke.*

The same decision maker inference is inapplicable to this case. The inference only applies when “an employee is both promoted and fired by the same decisionmakers within a relatively short period of time” *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 453, 115 P.3d 1065 (2005). Here, Burke was not promoted by Mayor Estes, the decision maker for the City. *See* CP at 82, 781. And applying this inference would require this Court to disregard Burke’s testimony that he was not offered the Public Works Director position. *See* CP at 783. Accordingly, this inference does not apply.

- b. The Respondents’ arguments about other employees attending the campaign party are not supported by the record or persuasive.*

The Respondents argue against an inference of retaliation based upon the contention that other employees, including Powell, attended the

campaign party. *See* Respondent's Brief at 48. They fail to offer any citation to the record in support of this fact. *See Id.* And, whether or not other employee's attended the party is of little import. Instead, the focus is on what Mayor Estes knew. "In a word, it was the employer's motive, and in particular the facts as the employer reasonably understood them, that mattered." *Heffernan*, 136 S. Ct. at 1418. Here, Mayor Estes is the person who decided to terminate Burke. *See* CP at 82. There does not appear to be any evidence in the record that Mayor Estes knew that Powell or any other employee had any involvement in the campaign party. *See* CP generally. And, even if he knew that another employee attended the party, Burke's role, as the host of the party, is distinct as reflected in Mayor Estes's comments when he confronted Burke. Specifically, he stated that Burke "shouldn't have **had** that party." CP at 331-32. (emphasis added). Accordingly, the claim that others attended the party does not undermine the inference of retaliation.

c. Respondents' contention that Burke dropped his grievances and right to arbitration also does not undermine an inference of retaliation.

The Respondents recite Burke's decision to not exercise his rights under the collective bargaining agreement, suggesting that he would have pursued them if they had merit. *See* e.g. Brief of Respondents at 11, 48. However, argument reflects a misunderstanding of the claim; this claim is independent of the collective bargaining agreement. *See Smith v. Bates*

Tech. Coll., 139 Wn.2d 793, 809, 991 P.2d 1135 (2000). In addition, the argument ignores potential justifications for not using the collectively bargained dispute process. *See e.g. Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 321, 96 P.3d 957 (2004) (applying collateral estoppel). Accordingly, the Respondents' arguments are unpersuasive.

d. The Grays Harbor County District Court's finding of probable cause also does not undermine the inference of retaliation, particularly because it was obtained based on the false representations of Powell and Howard.

The Respondents also argue that the Appellants cannot refute the finding of probable cause by the Grays Harbor County District Court. Brief of Respondents at 48. Initially, the Appellants do not need to refute the finding because it has no impact on whether there is an inference that Mayor Estes was substantially motivated by retaliation when he terminated Burke. And, the Respondents are incorrect in their assertion. The finding of probable cause was based, at least in part, on the false information prepared by Howard and Powell regarding the City's paint usage. *See* Brief of Appellant at 38. Accordingly, the Respondents' arguments against an inference of retaliation are unpersuasive.

D. The Respondents failed to present conclusive evidence of a non-retaliatory justification for Burke's termination.

The Respondents offer extensive argument regarding an employer's right to interview its employees, and the policy behind this

right. *See* Brief of Respondents at 41-43. However, the employer's right in this case is overshadowed by its own conflicting statements regarding Burke's termination. *See* CP at 489. Specifically, Powell's March 14, 2013 email establishes that Mayor Estes decided to terminate Burke before Burke was directed to attend an interview. *Id.* The record does not conclusively reveal a non-retaliatory motive. *See* Brief of Respondents at 46-47.¹¹

II. CONCLUSION

Accordingly, the Appellants respectfully request that the order granting summary judgment on their claim for termination in violation of public policy be reversed.

RESPECTFULLY SUBMITTED this 10th day of June, 2016.

DAVIES PEARSON, P.C.

/s/ Trevor D. Osborne

Trevor D. Osborne, WSBA No. 42249
Attorneys for the Appellants

¹¹ The employer bears the burden of proving a non-retaliatory motive. *See Thompson*, 102 Wn.2d at 232-33.

DAVIES PEARSON PC

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Transmittal Letter

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No. 48497-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RUSSELL BURKE and JULIE BURKE, and their marital community,

Plaintiffs/Appellants,

v.

CITY OF MONTESANO; KEN ESTES and "JANE DOE" ESTES;
KRISTY POWELL and "JOHN DOE" POWELL; and ROCKY
HOWARD "JANE DOE" HOWARD,

Defendants/Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE ERIK PRICE
THURSTON COUNTY SUPERIOR COURT CASE NO. 14-2-01089-1

AFFIDAVIT OF SERVICE REGARDING
REPLY BRIEF OF APPELLANTS

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STATE OF WASHINGTON)
)ss.
COUNTY OF PIERCE)

JODY M. WATERMAN, being first duly sworn upon oath,
deposes and says:

I am over the age of 18 years and competent to be a witness herein;
that on the 10th day of June, 2016, I served and filed a copy of the
following documents via Email and/or First Class Mail on the court and
persons whose names, addresses and email addresses are shown below:

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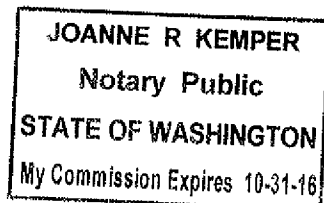
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DOCUMENTS:

1. Reply Brief of Appellant
2. Affidavit of Service


JODY M. WATERMAN

SIGNED AND SWORN to before me this 10th day of June, 2016,
by Jody M. Waterman.




Print Name: JOANNE R. KEMPER
NOTARY PUBLIC in and for the State of
Washington.
My commission expires: 10/31/16

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